Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-1200

In the Supreme Court of the United States

OCTOBER TERM, 1995

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ZELL MILLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. In our certiorari petition, we show (at 14, 22-24) that, although the court of appeals ostensibly "dismiss[ed]" respondents' petition for review of the Federal Communications Commission's (FCC) declaratory ruling (see Pet. App. 15a),[1] it actually granted their petition for review, insofar as they challenged the FCC's authority to preempt state-law

[1] In this brief, "Pet." refers to the petition for a writ of certiorari in No. 95-1200, and "Pet. App." refers to the appendix to that petition. "Br. in Opp." refers to the candidates' brief in opposition to the petitions in No. 95-1197 and No. 95-1200. "Cross-Pet." refers to the cross-petition, No. 95-1361.

causes of action dependent on a determination of a broadcast station's lowest unit charge under 47 U.S.C. 315(b). Respondents agree that the court of appeals ruled in their favor on that issue. See Br. in Opp. 3 (noting that the court of appeals "actually addressed" the FCC's authority to preempt state law); *id.* at 4 (arguing that court of appeals "concluded correctly that the FCC had no authority to issue the Declaratory Ruling"). They accept, therefore, that the issue of the FCC's authority to preempt state-law causes of action (as well as the propriety of doing so by declaratory ruling) is properly presented for review by this Court.

Respondents argue, however, that the Court should not grant the government's or the broadcasters' petition unless it also addresses the court of appeals' jurisdiction to review the case and the merits of the FCC's decision to preempt state law. See Br. in Opp. 5 n.2; Cross-Pet. i, 6. In our view, both issues are subsumed within the questions presented by the initial petitions. We do not, however, oppose the granting of the cross-petition in order to make clear that the parties may address those questions.

The cross-petition also presents the issue of Congress's intent on the question of preemption. See Cross-Pet. i, 11. Because judicial economy and regulatory certainty would be served by the Court's resolution of the entire preemption question, in both its statutory and administrative aspects, we also do not oppose the granting of the cross-petition on that issue. The FCC's declaratory ruling was intended to provide definitive guidance as to Congress's intent in Section 315(b). The FCC's analysis of Congress's preemptive intent was closely connected to its decision on its own initiative to preempt state law, in that

both conclusions involved the agency's analysis of Congress's objectives. See, *e.g.*, Pet. App. 19a-20a, 22a-23a (declaratory ruling's discussion, in both contexts, of statutory objectives of consistency, certainty, and uniformity). Although the court of appeals concluded that no case or controversy was presented as to congressional intent and therefore did not address that issue, the court's failure to reach the issue was error, as we have explained (Pet. 18-19, 24 n.19).[2]

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[2] Respondents argue (Br. in Opp. 4-5) that, although the court of appeals "concluded correctly that the FCC had no authority to issue the Declaratory Ruling," that court "properly declined to render an advisory opinion on the issue of Congressional intent" to preempt state-law causes of action under Section 315(b). See also Cross-Pet. 7. Respondents do not explain, however, how there could be a case or controversy as to the former issue but not the latter—especially since the FCC concluded, in its declaratory ruling, that Congress itself preempted state law in Section 315(b). See Pet. App. 19a-21a.

This case is not like *Houston Post Co.* v. *United States*, 79 F. Supp. 199 (D. Tex. 1948), in which a three-judge district court dismissed a petition for review of an FCC licensing order for lack of a justiciable controversy. In that case, the petitioner radio station's objection was directed not to the FCC's action (renewing another station's license) but to the possible precedential effect of some of the FCC's accompanying statutory analysis. The district court relied on representations by agency counsel that the FCC "did not intend to, nor did it, by giving expression as to its opinion as to [the meaning of the statute], add anything either of substance or of sanction to, the law." *Id.* at 202. By contrast, here the FCC intended its interpretation of Section 315(b) to have actual, present effect, including the dismissal of lawsuits predicated on alleged violations of that Section. "[T]he pronouncement was in fact and in law intended to be, and was, an order laying down a positive rule of law." 79 F. Supp. at 203.

2. Respondents do not dispute that the preemption questions at issue in this case are important. Rather, they present several arguments in defense of the judgment below; because those arguments go to the merits of the case, we will address them only briefly.

a. Respondents argue (Br. in Opp. 5-6) that the FCC has no authority to preempt "state causes of action or the jurisdiction of any court" because Congress has not expressly delegated it such authority. The proper analysis, however, focuses not merely on whether such authority has been expressly delegated, but on whether the FCC's preemption decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988). Respondents rely on *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 374 (1986), but that case, as the Court explained in *City of New York*, 486 U.S. at 66, involved a provision "in which Congress appeared to have expressly limited the Commission's jurisdiction, so as to prohibit it from preempting" certain state laws. Because the provision at issue in the *Louisiana* case was a "congressional *denial* of power to the FCC," the Court there rejected the argument that "the FCC may nevertheless take action which it thinks will best effectuate a federal policy." 476 U.S. at 374. No corresponding limit on the FCC's authority to preempt state law is at issue in this case, and so, under the proper analysis, the courts should not disturb the FCC's judgment unless "the accommodation [of policies] is not one that Congress would have sanctioned." *City of New York*, 486 U.S. at 64.

Respondents do not dispute that Congress may confide the initial responsibility for resolving federal

statutory issues to a federal agency, subject to review only in the federal courts. See Pet. 15-16. This Court has also made clear that, under the Supremacy Clause, "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). It is simply incorrect, therefore, to say (as did the court of appeals) that Congress "could not delegate[] the power to any agency to oust state courts and federal district courts of subject matter jurisdiction." Pet. App. 10a. That "ouster" of judicial jurisdiction is merely the necessary consequence of the FCC's determination that state-law causes of action should be preempted. Because the FCC has concluded that certain causes of action related to Section 315(b) should be preempted, courts should dismiss suits to the extent that they attempt to raise such claims. See Pet. App. 24a-26a, 59a; cf. *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 527 (1959).

Respondents err in relying (Br. in Opp. 5) on cases such as *Tafflin* v. *Levitt*, 493 U.S. 455, 459 (1990), and *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), for a presumption that "Congress did not intend to displace state law." That presumption is an interpretive canon used in implied preemption cases, in the absence of an express preemption provision, to determine whether state law has been displaced. It has no bearing in this case, since the FCC unambiguously stated its intent to preempt state-law claims that are dependent upon a determination of the lowest unit charge under Section 315(b). Cf. *City of New York*, 486 U.S. at 65.

b. Respondents argue (Br. in Opp. 6-8, 11-12) that, as applied to cases in the federal courts, the FCC's

preemption of state-law causes of action violates the separation of powers by interfering with the power of the federal courts to render final judgments. That contention is without merit. Unlike the statute at issue in *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995), or the FCC order on review in *Town of Deerfield* v. *FCC*, 992 F.2d 420 (2d Cir. 1993), the declaratory ruling at issue here does not purport to revise or reopen any final, unappealable judgment based on a prior construction of federal law. Although the FCC in its ruling did state that state-law causes of action based on the lowest-unit-charge rule should be dismissed (see Br. in Opp. 8; Pet. App. 40a-41a n.8), that remark merely explained the necessary effect of the FCC's preemption ruling on a future or ongoing case, just as a lawsuit raising issues of federal labor law should be dismissed if those issues must be considered in the first instance by the National Labor Relations Board. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246 (1959).

c. Respondents also argue (Br. in Opp. 9-10) that federal agencies have no authority to issue "[b]inding [i]nterpretation[s] of [c]ongressional [i]ntent" on the question of preemption. Whether or not the FCC's interpretation of Section 315(b) is "binding," it is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for Congress has vested the FCC with the authority to enforce the substantive provisions of Section 315(b) with respect to "all federal, state and local candidates for office throughout the nation." *Kay* v. *FCC*, 443 F.2d 638, 643-644 (D.C. Cir. 1970). By contrast, in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), the principal case relied on by respondents, the

Court stated that it would not defer to the Department of Labor's view on whether a federal statutory private right of action is precluded by receipt of state workers' compensation benefits because Congress had "expressly established the Judiciary and not the Department of Labor as the adjudicator" of private rights under the statute. *Id.* at 649.

Respondents attempt to distinguish the numerous cases in which the courts have upheld agencies' authority to preempt state regulatory authority or common-law causes of action on the ground that those cases did not implicate the courts' power to exercise judicial jurisdiction. Br. in Opp. 10-11. They do not explain, however, why the FCC should unquestionably have the authority to preempt the exercise of regulatory authority under state law by state utility commissioners, which otherwise could give rise to enforcement actions in the state courts, but not have similar authority to preempt state-law causes of action that would be heard directly by state courts (or by federal courts sitting in diversity). Indeed, this case presents a compelling case for preemption of state remedies, for the causes of action that respondents wish to advance, although nominally arising under state law, are in fact predicated on the federal lowest-unit-charge rule of Section 315(b).[3]

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[3] For the same reason, respondents err in suggesting (Br. in Opp. 6) that 47 U.S.C. 414, which provides that "[n]othing in th[e] [Communications Act] shall in any way abridge or alter the remedies now existing at common law," negates FCC authority to preempt state causes of action requiring a determination of the lowest unit charge. As the FCC explained, the savings clause has no bearing on state-law causes of action that "have no meaning apart from Section 315(b) and thus derive

d. In their cross-petition, respondents argue (at 9-10) that the FCC must lack authority to preempt state-law causes of action predicated on a determination of the lowest unit charge because it also lacks authority to order an adequate replacement remedy, such as a refund to overcharged candidates. In fact, the FCC does have authority to order broadcasters to provide rebates to candidates to remedy violations of the lowest-unit-charge rule, and it has exercised that authority in the past. See Pet. 5 & n.3; Pet. App. 61a, 77a n.51. Thus, this is not a situation in which the agency action under review "does not provide access to any type of administrative process." *Centel Cable Television Co.* v. *Admiral's Cove Assocs.*, 835 F.2d 1359, 1363 (11th Cir. 1988).[4]

Respondents stress (Cross-Pet. 9) that the FCC's express refund authority under the Communications Act applies only to common carriers, and not broadcasters. The fact that Congress expressly gave the FCC authority to order rebates by common carriers,

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not from any 'existing' state common law or statutory origin, but solely from the federal statute." Pet. App. 26a.

[4] Respondents suggest (Cross-Pet. 9) that the FCC did not provide a remedy for a broadcaster in the situation in which a candidate refuses to pay for advertising and claims that the broadcaster's rate exceeded the lowest unit charge. They suggest that the broadcaster in that situation would be deprived of its remedy under state law (such as a collection action) without any adequate replacement. That case, however, would arise only when the candidate declines to invoke the FCC's jurisdiction to adjudicate a claim that the broadcaster violated Section 315(b) and instead relies on the self-help remedy of withholding payment. Such a party would not be well situated to complain that a collection action could not be brought in state court because it would raise the lowest-unit-charge issue as a defense.

however, does not justify an inference that it intended to preclude the FCC from ordering rebates by broadcasters. The FCC's general authority under 47 U.S.C. 154(i) to "issue such orders * * * as may be necessary in the execution of its functions" has been held sufficient to sustain rebate orders. See *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1107-1108 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989); cf. *Time Warner Entertainment Co., L.P.* v. *FCC*, 56 F.3d 151, 196 (D.C. Cir. 1995) (upholding FCC authority to order refunds for unlawful basic cable television rates, even though statute expressly authorized refunds only for premium cable rates), cert. denied, 116 S. Ct. 911 (1996).

e. Respondents suggest that primary jurisdiction, rather than preemption, is the proper response to concerns about uniform construction of Section 315(b). The FCC found, however, that because the doctrine of primary jurisdiction is of uncertain application, there could be no assurance that a particular court would refer the liability issue under Section 315(b) to the FCC in the first instance. The FCC also noted the danger that state courts could issue remedies inconsistent with those deemed appropriate by the FCC; that possibility might discourage broadcasters from carrying political advertising, thereby frustrating Congress's purpose of "foster[ing] dissemination of information regarding political campaigns." Pet. App. 60a.

f. Finally, respondents make a broad-gauged attack on the reasoning employed by the FCC in concluding that state-law causes of action were (by Congress) and should be (by the agency) preempted. They argue, for example (Cross-Pet. 11-13), that the question of the existence of an implied private right of

action is irrelevant to the preemption issue. We agree that the two questions are distinct, but they are related; indeed, in *Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552, 1556 (11th Cir. 1983), relied on by respondents (Cross-Pet. 11), the court concluded that the same evidence concerning the "legislative history, structure, purpose and scope" of the Rehabilitation Act of 1973 both supported preemption of state-law claims and negated the existence of an implied federal cause of action. The two issues are related because they both implicate Congress's intent to "centralize" enforcement of Section 315(b) in the FCC, rather than in private actions pursued in the courts (state or federal). See Pet. App. 56a.

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For the foregoing reasons, and also for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

MARCH 1996